77-402

No. _____

In the Supreme Court of the United States

October Term, 1977

Jacob C. Ferguson, Petitioner

v.

The Board of Trustees of Bonner County School District No. 82, A Municipal Corporation of the State of Idaho, and Vernon Ruen, Dr. William H. Morton, Jr., Venus Verhei, Marian Ebbett, and Dr. David Beeson, constituting the members of said Board, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION to Petition for a Writ of Certiorari

To the Supreme Court of Idaho

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September 26, 1977

SUBJECT INDEX

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heard, he knew his right to counsel, he knew his right to cross-examine witnesses and he still knowingly and voluntarily walked out of the proceedings.

ARGUMENT

THIS CASE SHOULD NOT BE REVIEWED BY THE SUPREME COURT SINCE THE IDAHO SUPREME COURT HAS DECIDED THIS CASE IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, THE CONSTITUTION AND LAWS OF THE UNITED STATES AND THE STATE OF IDAHO.

In deciding this case, the Idaho Supreme Court carefully reviewed several decisions of this Court having to do with due process procedures, including the cases of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1971); and Hortonville Joint School District No. 1 v. Hortonville Education Association, ____U.S. ____, 96 S.Ct. 2308 (1976). The Petitioner argues that because the notice sent to him gave him the impression that he was already discharged he was denied due process and an arbitrary taking had already occurred. This was not the case in reality, and Petitioner was advised that his contract had not been terminated at the hearing. Further, the notice did not state that he "was" discharged, but that he "should" be discharged. The Petitioner contends correctly that Fuentes, supra., states that ". . . no later hearing . . . can undo the fact that the arbitrary taking that was subject to the right of due process has already occurred." The Fuentes case concerned the repossession of personal property. In that case the property was actually taken away from the individual prior to any

type of notice of hearing. In the instant case no such actual taking of any property right had occurred prior to notice and the hearing. Therefore there was no attempt to correct a taking without due process.

Petitioner's contention that the notice did not advise him of the charges and a right to a hearing is incorrect. The notice specifically set forth the reasons for his proposed discharge and specifically notified him of his right to a hearing, to counsel, to present evidence and to question witnesses. (Appendix A, pp 15-16)

Petitioner states that he was under the impression that ". . . he had been fired . . . ," however he was specifically advised that he had not been fired as of that point in time and that if he wanted to request a continuance of the hearing he could do so.

In each of the cases decided by this Court it has been held that due process requires that an opportunity for a hearing be given to an individual who may be deprived of a property right. This opportunity was given to Petitioner and he refused to take the opportunity. To allow a person to take the actions Petitioner took in this case, would be to allow a person to set up any adjudicative body in order that said body could never take any actions without falling into a trap set by the individual involved. The Board in this case gave to the Petitioner every chance to participate in a meaningful manner and he willfully, voluntarily, and knowingly refused.

Concerning the contention that the Board could not make an unbiased decision because of its investigative role, the Respondents have shown, throughout the proceeding, as seen in Appendix A, that no such prejudice existed. The Respondents are vested by statutes with the duty and responsibility of running the School District. Respondents therefore would, of necessity, be required to investigate any matter having to do with its statutory

responsibilities. This Court stated in Hortonville, supra., that:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." At 2314.

This Court in the Hortonville case went on to cite an earlier case decided by it which states:

> "Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was 'involved' in the events preceeding this decision, in light of the important interests in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power." At 2316.

The Petitioner has not carried his burden of persuasion in this case. The Petitioner has shown nothing except that the Board was carrying on its statutory duties. There is nothing to indicate that Respondents were not being as fair and honest as possible, and that Petitioner was repeatedly given every opportunity for a meaningful hearing and he refused to participate.

CONCLUSION

The Idaho Supreme Court has carefully and consistently followed the cases decided by this Honorable Court both in their spirit and in their letter of the law. Petitioner was given notice of the charges against him as well as his rights under the Constitution. He was given an opportunity for a meaningful hearing, which opportunity he voluntarily, knowingly, and willfully waived. Petitioner

was not discharged until after he had his opportunity for hearing and waived it. The Respondents repeatedly showed to the Petitioner that they wanted to hear his side of the story and Petitioner refused them that opportunity by leaving the meeting.

For these reasons this Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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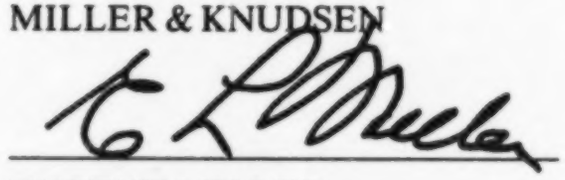

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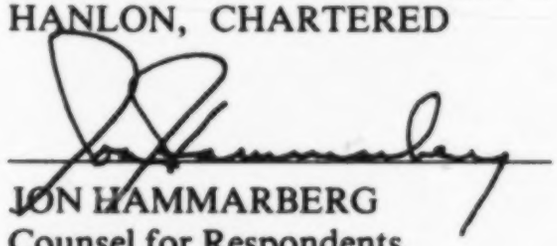

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September 26, 1977

APPENDIX A

TRANSCRIPT OF HEARING
BEFORE THE BOARD OF TRUSTEES OF
BONNER COUNTY SCHOOL DISTRICT NO. 82

BONNER COUNTY SCHOOL DISTRICT NO. 82

Trustee Meeting No. 522
Administration Office
Sandpoint, Idaho
June 26, 1973

HEARING - JACOB FERGUSON

Present at the Hearing: Mr. Jacob Ferguson, Trustees Beeson, Ebbett, Morton, Ruen and Verhei. Also present were Superintendent Likens, Assistant Superintendent Lamanna, Clerk-Treasurer Hagadone, Attorney Featherston, W. L. Overholser, William Miller, Harold Walker, Roy and Randy Self, Mr. and Mrs. K. L. Mott and Deana, Russell Keane, and Bill Denman.

Mr. Ruen: All of us are here that need to be here at this point. You have been notified and have asked for the hearing tonight.

Mr. Ferguson: That is correct.

Mr. Ruen: I think at this point I will ask Mr. Featherston to open it.

Dr. Likens: One thing, Mr. Chairman, we ought to clarify what we are going to do in terms of this meeting . . .

Mr. Ruen: How we are going to cooperate that one . . .

Dr. Likens: Yes.

Mr. Ruen: Do you want Mr. Featherston to explain that one or do you want me to explain?

Dr. Likens: Yes.

Mr. Ruen: Do you want to explain, Mr. Featherston.

Mr. Featherston: Basically, all I have discussed with the Board is a procedural point and it is my feeling in that

the vote as given to Mr. Ferguson only sets forth an accusation, not a final determination by the Board. It would be necessary for the Board or for the District to present testimony one way or the other and for Mr. Ferguson to have the opportunity to cross examine or question anybody that is presented and Wayne — Mr. Hagadone — could you swear witnesses that will be called to testify?

Mr. Hagadone: Yes.

Mr. Featherston: I just briefly discussed with Mr. Ferguson, just before the meeting, this procedural point, it is a feeling, as I understand it, that you just wanted to question some people.

Mr. Ferguson: Yes.

Mr. Featherston: You didn't want to present anybody independently. . .

Mr. Ferguson: No.

Mr. Featherston: This may have some bearing on the procedure you want to follow if you want to vary your procedure due to this, it will be fine. Is it strictly members of the Administration or Board?

Mr. Ferguson: School Board members.

Mr. Featherston: Just School Board members?

Mr. Ferguson: Yes.

Dr. Morton: Mr. Chairman, if I may, I would prefer to have the district's witnesses called one by one and to have all witnesses excluded except during the time of testimony.

Mr. Verhei: Do you want to make that a motion?

Dr. Morton: I would move that we call the witnesses individually and have them in the room only during the time of testimony, subject to recall.

Mr. Ferguson: If I might interject, I really don't care to hear any testimony and I don't care to question anybody except the Board Members. You can hear all the witnesses that you like — I just came here this evening to question you as a matter of fact, because you were the Chairman of the Board when the action was started.

Dr. Morton: This is correct.

Mr. Ferguson: And I only have one question . . .

Dr. Morton: I don't particularly care, I think that if we are going to have testimony given this evening, it's in the interest of justice — it's not right for one witness to hear what another witness says.

Mr. Ruen: So that you're saying now . . . anybody here of these names who are listed, or anybody else that's bearing evidence be outside of the room until our Attorney asks them to come in.

Dr. Morton: Right, this is what I am saying.

Mr. Featherston: Or Mr. Ferguson . . .

Dr. Morton: Yes, or Mr. Ferguson.

Mr. Featherston: The only other variation I would request on that would be that the members of the administration or Board who either Mr. Ferguson or myself would want to inquire of, be allowed to remain during the duration of the hearing. I think that the nature of any testimony from the members of the administration would be substantially different than anything from the lay witnesses and parents and students, would be a distinct classification — if this is all right with you.

Mr. Ruen: Did I understand you correctly in that you said you didn't care about hearing anything?

Mr. Ferguson: That's correct.

Mr. Ruen: That you came here to ask one question . . .

Mr. Ferguson: Yes.

Mr. Ruen: . . . is it your feeling that you'd like to at some stage of this thing — as I understand you —

Mr. Ferguson: Yes . . . Maybe if I made a statement it would . . . I might clarify what I am thinking. The letter indicates a certain amount of evidence has been received by the Board. I assume that they have received all of the evidence, whatever it is to date — that they have made their decision to dismiss me based on this evidence, is this not true?

Mr. Featherston: If I might make a point of clarification for Mr. Ferguson at this point . . . unfortunately the way the law requires that these procedures be set out — is that the Board make a cursory or a finding that there is some substance or some reason why a hearing should be held. A hearing held and further action as to a teachers contract — and at that point, based on that, they make and pass a Resolution and send out a notice to the teacher advising him of this and this does not mean that the action taken at that point is final, assuming that there was no hearing held whatsoever, the Board would still have been required to take additional action in order to terminate a contract. So at this point, the contract would not be terminated.

Mr. Ferguson: What you are saying is they have not heard all the evidence as of this time.

Mr. Featherston: This is correct . . . it is very similar to in law, you have criminal and civil law, where you have an individual sign a complaint or whatever and in this case, the school district, the Board, is the only one authorized to send out this notice. The Administration, School District, Attorney, parents, are not authorized to send out this notice to a teacher.

Mr. Ferguson: If I had not requested this hearing then there would be no hearing, is that correct?

Mr. Featherston: There would still have to be some type — some type of a . . .

Mr. Ferguson: Well yes, at a regular Board Meeting they would decide to continue along with the process that they had started.

Mr. Featherston: This would be a default procedure, yes, there would be nothing shown to the contrary . . .

Mr. Ferguson: That is why I had assumed that the Board had received all the evidence.

Mr. Featherston: No . . . I think you were advised in the notice that you had the right to legal counsel also.

Mr. Ferguson: Oh — yes.

Dr. Morton: Why don't we read the resolution again verbatim so that we know what we are talking about here. It has been sometime since some of us have read it.

Dr. Likens: May 15, 1973 — RESOLUTION FOR DISCHARGE OF TEACHER — It is Resolved By: The Board of Trustees of Bonner County School District No. 82, of Bonner County, Idaho, being fully advised in the premises, and being of the opinion that Jake Ferguson, a teacher in said District, should be discharged for the following reasons:

Applying a grading system for an improper purpose and which does not relate to the level of difficulty of work to such an extent as to constitute gross neglect of duty in failing to report progress of students to parents accurately, and that said acts constitute insubordination in that the teacher has previously been instructed to correct this deficiency and neglected to do so.

A hearing may be requested by Jake Ferguson within 30 days after receipt of a copy of this resolution for the purpose of showing cause why said discharge should not be effected.

Said hearing must be held within 15 days after the request is received. At said hearing, the teacher may be represented by counsel and may present evidence on his own behalf and examine any person who may have spoken against him.

It was moved, seconded and carried that the above resolution be adopted . . .

Mr. Ferguson: That sounds pretty conclusive to me — like I say, from that, I assumed that the Board had heard all the evidence.

Mr. Ruen: Well, actually, that is the reason for the hearing. It says, the Board, in essence, is of the opinion that what they know at that point is legal to believe, shall we say, that a teacher should be discharged — then the hearing is for you, if you ask for a hearing, to justify your grading systems, to do whatever you choose — because if you ask for a hearing, the assumption is that you don't agree with the reason up to that point and this is to let you present your reasons for . . .

Mr. Ferguson: That's right, and I have, as I said, just one question that I wish to ask and as far as I am concerned that's all I am here for. If you would like to hear more evidence — I don't understand how a Board can take action on only part of the evidence — but that is your business, not mine.

Mr. Ruen: No action has been taken.

Dr. Likens: It is initiated though.

Mr. Ruen: Yes, we have, this is right — it is initiated — but some of these things are governed by state law

and we have to do things in a certain way. Whether we like it or whether you like it. This resolution is something that is required by law to be done in a certain way and to word it exactly to say what we are trying to say is a difficult thing in itself because even that is . . .

Mr. Ferguson: Well counselor, since you are the legal mind — how do we proceed?

Mr. Featherston: Have you talked to an attorney?

Mr. Ferguson: No, I haven't.

Mr. Featherston: Your attorney could have explained this procedure to you if you had stopped in and made an office call and we can either — if you feel you would be jeopardized by proceeding without counsel or proceeding further in this hearing at this point, you could make a request to the Board for a continuance on this hearing for a certain length of time. The Board could consider your reasons, whatever — or we can proceed — I am prepared to proceed at this point to present testimony.

Mr. Ferguson: I mentioned to you outside that I had requested the hearing and I mentioned to these gentlemen that I really don't care to hear any testimony and I care not to question anyone. So if it is all right with you, I will go ahead with my question and then you can go ahead with your hearing — or with my hearing.

Mr. Featherston: I would agree with this variation in this procedure . . . it wouldn't make any difference to me.

Dr. Morton: I wonder if, in the interest of justice all the way around, it wouldn't be wise to again remind Mr. Ferguson that he can have the opportunity to retain counsel.

Mr. Ferguson: Can I ask you a question, Dr. Morton?

Dr. Morton: Surely.

Mr. Ferguson: In the interest of justice, you have a procedure, I believe, that suggests that if there is some difficulty — that it go through the administrative steps — Principal, Superintendent and Board, isn't that correct, is there such a procedure in your manual?

Dr. Morton: This is true.

Mr. Ferguson: Before you published my proposed dismissal in the paper, why wasn't that procedure followed?

Dr. Morton: I think that as far as the Board is concerned, in concept, that procedure was followed.

Mr. Ferguson: Oh, I see.

Dr. Morton: So this is one of the reasons that if you don't think it was — this gets right back to my suggestion of about two minutes ago — if you feel that you are not being fairly taken care of in this respect, it would be my urgent suggestion that you retain counsel . . . because this Board, believe me, Mr. Ferguson, and I am sure I can speak for all of us — has no intention of railroading anyone. I think that you should know that we want you to have just as fair a shake as you can have.

Mr. Ferguson: Well then, why wasn't that procedure followed?

Dr. Morton: As far as the Board is concerned, it was followed and it would have to be proven differently before the Board would know any differently.

Mr. Ferguson: Maybe I misread the manual but I understood that the process was that if a Principal and a Teacher could not resolve their differences they were to go to the Superintendent — if the Superintendent and the Teacher could not resolve the differences, then they were to go to the Board.

Dr. Morton: It is the Board's understanding this procedure was followed and if it is your understanding it wasn't followed, then it is up to you to prove it wasn't.

Mr. Ferguson: I think that is quite clear because I requested this hearing . . .

Dr. Morton: It is not clear to me — without some proof, I am only speaking for myself now.

Mr. Ruen: Would you explain that a little bit . . . it is not quite clear to me what you mean.

Mr. Ferguson: There is a grievance procedure adopted by the School Board of this District and I am just going from my cursory understanding — that if a Principal and a Teacher cannot reconcile a difference, regardless of what it is, then they are supposed to go to the Superintendent. If their differences cannot be reconciled at that level, then the whole matter goes to the School Board . . . and then if it can't be reconciled at that level, where it would go, I don't know. But, in this case, the last time I talked with Dr. Likens, was in September, last year. Since then, I have talked with the Administrator at the Junior High School whenever a problem arose. O.K., I was told by that Administrator on Monday — when we had a difference of opinion — I am going to take this to the Superintendent. On Wednesday, the Superintendent was in the Junior High School office with Mr. Lamanna and the two Administrators at the Junior High School and he read this letter to me. Now, I don't believe that that's following the procedure.

Dr. Morton: It may be well to get out the policy manual and just review it . . .

(At this time Mr. Ferguson excused himself for approximately 3 minutes to obtain a drink of water.)

Dr. Likens: I'll wait until Mr. Ferguson gets back. Continuing . . .

In terms of grievance, in terms of teacher evaluation and teacher disciplinary action, a different procedure is followed.

Dr. Morton: A grievance, by my definition has to do with working conditions, salaries . . .

Mr. Verhei: Well, of course, on a broader term, this would be a grievance too.

Dr. Likens: A grievance is basically after an administrative recommendation or decision has been made.

Mr. Verhei: Yes, but then does the policy state that the teacher and the principal is supposed to contact the administrator?

Dr. Likens: Either one, the teacher or administrator can contact me, the Superintendent, to try and set down with the two of them to resolve a grievance. In terms of an evaluation and making recommendations for continued employment, et cetera, it is the principal's responsibility, when you start getting into a termination case, to make a recommendation to this office. This was done. The difference between this and a year ago — there was no recommendation for termination — there was a recommendation for reassignment. The principal in this case, after working with the teacher — and we can produce letters to the teacher from the principal spelling out the difficulties — Mr. Overholser, said to the teacher and then to this office, we can't go any more this way, in essence, it is my recommendation that additional action be taken.

At that particular point that came to me, I elected to take it directly to the Board to get to the place that we could get down to the basic facts of whether

this Teacher's performance merited continued employment. The grievance — my decision to take that to the Board, is what this is.

Dr. Morton: This hearing now.

Dr. Likens: Right.

Mr. Verhei: Is that what it states there?

Dr. Likens: We do not have any specific statement except as it applies to the general citizens — this is one area that our manual should be strengthened. (Dr. Likens read the specific spelled out for procedures from the manual). "Any citizens or group of citizens" and this is the only place we have any specific spelled out procedures — it is a basic operating procedure — but it is not spelled out in Board policy, "desiring to bring items of business before the Board shall submit their requests in writing at least three days before regular Board meetings. Such requests shall be submitted to the Superintendent of Schools. If the matter cannot be resolved by direct action of the Superintendent, the Board of Trustees, through the Superintendent, shall schedule the citizens or group of citizens to be present at the next regular meeting convenient for their appearance."

Mr. Verhei: There is nothing there with regard to the employee then?

Dr. Likens: There is no specified procedure. Operationally we say that if there is a grievance between a staff member, in fact, I've been working on policy on this as a result of the custodian affair — that it should be resolved with the immediate supervisor, then the immediate supervisor makes a decision, the employee has a right to appeal it to this office and then eventually to the Board. The policy spells out the process of who makes the evaluations and the recom-

mendations come from the building principal to this office.

I think within this group, show where I've said I don't think you have a reason for me to take it beyond this point even with the principals here although I'd not intended to go that route.

Dr. Morton: In other words what you are saying — the policy manual does not spell out step by step procedures to be followed in cases of this specific nature.

Dr. Likens: In grievance — normally — in terms of a normal procedure. We have asked the teachers association here to get involved in development of a grievance procedure. Normally deals only with a negotiated agreement between the Board and the Teachers Association. In other words, these are the things we agree to — in ours it spells out — the only things that teachers, under a formal grievance procedure — although they have not adopted one, would be a grievance procedure itself — salary, salary related fringe benefits, and hours.

Mr. Featherston: This type of matter, in my opinion, is covered by statutory and case law and general due process of procedures and this is what we are attempting to do at this time is to follow due process — there has been a dispute — I wouldn't even class it as a dispute — there has been a complaint by a teacher on the professional level of a professional nature and it comes to the matter of due process — the Administration has made the recommendation of termination and the next step is the hearing which Mr. Ferguson has requested.

Mr. Ferguson: But if I hadn't of requested it, your process would be to just go ahead with the dismissal, right?

Mr. Featherston: Yes, but default hearing — just like any lawsuit, Mr. Ferguson.

Dr. Morton: Am I correct in assuming that our procedure here now is in accordance with Idaho Code — rather than with any type of school policy, is that correct?

Mr. Featherston: Idaho Code and recommendations of the Attorney General's office and the State Board of Education as defined by the Attorney General's office and the Idaho Supreme Court due process requirements.

Dr. Morton: Then we are acting within the proper legal authority.

Mr. Featherston: This is correct.

Mr. Verhei: Then my understanding has been, of course I must of had the wrong understanding, that what Mr. Ferguson said was correct as far as what my understanding concerned was — that if a teacher and principal cannot settle differences they take it to the Administration and if they can't settle it they take it to the Board — has this been your understanding, Vern?

Mr. Ruen: Well, with citizens, we've never been in this thing before . . . this is our first time for this.

Mr. Featherston: I might point out this is the same or similar procedure used that we followed through with a teacher that was represented by counsel last year — we had a case where the teacher was represented by counsel, and in that case the teacher was not terminated and we did follow this procedure and counsel never at any time raised any issue over due process. Strictly a factual matter we resolved at that time.

Dr. Morton: I am satisfied, Mr. Chairman, that we are moving in the proper legal circumference — this is what concerned me.

Mr. Ferguson: What have you decided to do?

Dr. Morton: We don't know yet.

Mr. Ruen: That is why we are here — for you to help us decide if you have reason to believe that we don't have all the facts as you see them.

Mr. Featherston: You desire to present anything first?

Mr. Ferguson: I just have one question to ask of Dr. Morton.

Mr. Featherston: Do you want to ask that now — before we proceed?

Mr. Ferguson: I might as well.

Mr. Featherston: Why don't you do that.

Mr. Ferguson: Dr. Likens read the letter that you sent me and it states in there reasons why the Board is recommending my dismissal and you are, I am sure, are aware of the facts in the letter.

Dr. Morton: This is correct — keep in mind, Mr. Ferguson, the Chairman signs this after action by the Board.

Mr. Ferguson: Well, because you signed it and were Chairman of the Board at that time is why I am addressing you. The thing I would like to determine is that on the evidence that the Board was presented — which resulted in this letter, do you feel that this evidence is all true and sufficient for my dismissal?

Dr. Morton: Well, if you are asking me to speak for the Board, I can't do that — I can speak for myself and I think you would have to inquire of each Board

member to get their individual reactions to your question. There is a question in my mind whether it is all true and that's why a hearing was suggested or was indicated.

Mr. Ferguson: Dr. Morton, if I hadn't requested this hearing you wouldn't of had it and you would have gone ahead with my dismissal.

Dr. Morton: Then my assumption would have been that if you had not requested a hearing that the allegations were correct. How else could I assume?

Mr. Ferguson: Fine.

Dr. Morton: But because I was not sure in my mind and because I am certain the other Board Members probably feel this way, you were granted, according to law, the opportunity to have a hearing.

Mr. Ferguson: But, Dr. Morton, if you weren't sure in your mind — why didn't you call the hearing . . .

Dr. Morton: Well essentially this is what we did.

Mr. Ferguson: No you didn't, I called the hearing.

Dr. Morton: Well I think it is a moot point really.

Mr. Ferguson: Well I think it is very important because you publicized in the paper that I was dismissed by unanimous vote.

Dr. Morton: Well I don't know whether that was the case or not now — I would have to see a newspaper article. Newspaper reporters are present and honestly I cannot remember what the newspaper article was — maybe you are right, I don't know.

Dr. Likens: In fact I have watched very carefully and I never did see a statement on this particular case.

Mr. Verhei: I saw the statement — his statement is correct.

Dr. Morton: This could be — I'm sorry to say that many times what reporters have to say about school board meetings or city council meetings or county commissioner meetings sometimes are not too accurate — maybe in this case they were accurate — I would like to know what the article actually said because I don't recall having seen it myself.

Mr. Ferguson: It was a sentence hidden in the last paragraph of the minutes of the Board meeting — of the write-up of the Board meeting — just one sentence that stated that the Board had unanimously voted to dismiss Mr. Ferguson.

Dr. Morton: This is one reporter's interpretation, you see.

Mr. Verhei: I think that was right — I think that it was unanimous . . .

Dr. Morton: We have not unanimously decided to dismiss him but have unanimously decided to send the resolution to him.

Mr. Verhei: That's right — it was a unanimous decision of the Board that was the action taken.

Dr. Morton: Yes, to send the resolution, right. But certainly is not tantamount to dismissal.

Mr. Ferguson: But the question I am asking you is that at that point did you feel that the evidence that you had been presented was true and was sufficient for my dismissal?

Dr. Morton: My answer to that is, yes sir, I did, and I am glad you came here tonight because maybe you will do something to change my mind.

Mr. Ferguson: Well, I am not going to do anything to change your mind, because I think you have already made up your mind.

Dr. Morton: Then you don't know me very well, Mr. Ferguson, and I'm sure you don't know the other Board members very well either.

Mr. Ferguson: Then if there is any doubt in your mind — you had better call another meeting after this one and get all the facts.

Dr. Morton: I think I suggested, twenty minutes ago, didn't I, Mr. Chairman, that we continue this so Mr. Ferguson could obtain counsel and could continue this hearing further.

Mr. Ruen: Yes, he can obtain anybody he chooses and present any statements — this is right, you did. I can see no reason why the Board would not go along with this — this is an opportunity for you to show us where you were right and we possibly either did not understand the situation or mis-informed or whatever.

Mr. Ferguson: This is what I just cannot understand — it just doesn't make sense to me — that you people including the Superintendent, would, after the Administration at the Junior High School and I had supposedly reached an impasse, would not continue your procedure — which is normally as I say, have the Superintendent review all the information with persons involved and if the agreement cannot be reached then the Board listen to all of the arguments — both sides — before you make any decision like this one and which you publicized in the paper.

Mr. Featherston: Mr. Ferguson, is this a formal notice published in the paper that you are referring to — or is this an editorial or a recorded part of the paper — is this in the legal notices?

Mr. Ferguson: As far as I am concerned I could care less where it is — it was in the paper and it did me personal damage.

Mr. Featherston: Was this in the legal notices?

Mr. Ferguson: No, it was not — it was a write-up of the Board meeting and what had transpired at the Board meeting.

Mr. Featherston: Presumably by the reporter or the editor of the paper, is this correct?

Mr. Ferguson: Yes.

Mr. Featherston: O.K., then it's your contention that the Board paid the editor or the reporter to put this notice in, in this form?

Mr. Ferguson: I have no idea what the arrangements were — I don't know how the newspapers get the Board minutes, whether they go listen to the Board or whether the Board sends copies of the minutes.

Mr. Featherston: It's not your contention that this is a paid advertisement or a paid legal notice in the paper that advised the public that you were terminated — it's just general reporting by the newspapers . . .

Mr. Ferguson: Information that the paper must have received by some action, I have no idea how.

Mr. Featherston: I think that clarifies that point because . . .

Mr. Verhei: The Board had nothing to do with that.

Mr. Featherston: Right — I know from my own personal experience that things can come out said in a different way.

Mr. Verhei: I don't think the Board ever had any intentions of publicizing that.

Dr. Morton: If a reporter is sitting here tonight he is free to report whatever he feels happens at this Board meeting.

Dr. Likens: By Board agreement, the newspapers may come in, and as soon as Wayne has the minutes typed, the unofficial minutes, they may read them.

Dr. Morton: This is right.

Mr. Featherston: These are matters of public interest and the public is entitled to know about it and of course the newspaper itself would be liable, not the Board. If the newspaper erroneously, falsely and maliciously published something and injured someone and then of course . . .

Mr. Ferguson: This is in direct contrast to the way that the Board conducted itself at the previous hearing which concerned my transfer — they went into executive session so that I assume that their reasons were that whatever was discussed would not be public . . . you see and in this case they discussed it apparently in a public meeting and as I say the information got into the paper and I feel that considerable personal damage was done by that notice.

Mr. Ruen: The action that lead up to the resolution, over the objection of several Board Members — one or two anyway, was held in executive session. We were required, as we were in the previous hearing, to come out and state a position and this was that this resolution as it's worded here would be such giving you an opportunity to correct us if we were wrong in our thinking at that point and which we did before — we came out of executive session and the final results were announced and voted on in public and the same thing was done in this case — you were not berated or discussed in public. We went into executive session and said it looks like that we have a problem that needs to be resolved and the law says certain things — the way to spell it out and give you an opportunity — and say

how many days you have according to law and the whole works to come and show us where we were wrong — we took this action — we came back out and voted on it in public and that was the action taken — sometimes, reporters report things that I don't like too . . . because they don't sometimes probably hear it all they don't understand it all, but this thing in the paper was not . . . it was an attempt, I suppose by, this is the Bee, I think . . .

No, it was in the other paper.

Mr. Ferguson: It was in both of those.

Mr. Ruen: Oh, was it? Well then they probably . . .

Dr. Likens: That particular night, there was neither paper represented.

Dr. Morton: It just went in the minutes then?

Dr. Likens: That's right . . . the minutes are clear — you can get them out and read them.

Dr. Morton: All the minutes are back from the year one for the public to read.

Mr. Featherston: Would you like additional time, Mr. Ferguson, would you like to consult with legal counsel?

Mr. Ferguson: No.

Mr. Featherston: I would be happy to stipulate to continue — in fact, I would prefer that you were represented by legal counsel — it would make it easier to conduct the hearing.

Dr. Morton: I would prefer it too.

Mr. Ruen: I would too — this is his choice, the law doesn't say he has to be and it doesn't even say he has to ask for a hearing.

Mr. Ferguson: Right.

Mr. Featherston: I would like to proceed then if — are you through with the questioning.

Mr. Ferguson: I'm through . . . thank you very much.

(Mr. Ferguson left the hearing at this time — 9:40 P.M.)

Dr. Morton: Mr. Chairman, hearing no evidence to the contrary, I move that the recommendation of the Administration be followed with respect to the dismissal of Mr. Ferguson as a teacher in this county and school district.

Seconded by Dr. Beeson, the motion carried. Trustees Beeson, Ebbett, Morton, Ruen and Verhei voting "yes."

Mr. Ruen: Now under discussion — where do we go from here at this . . .

Mr. Featherston: I think this would be a legally sound position, Mr. Chairman, because again I daresay I could analagize it to a civil law suit where a person defaults which in essence Mr. Ferguson has voluntarily elected to default in our presence, the Board's presence — you can file an affadavit or go on the basis of the allegation of your complaint. I think there has been sufficient evidence presented showing that the . . .

Mr. Ruen: Do you think that we should go ahead and hear . . .

Mr. Featherston: I think it wouldn't hurt to really possibly present Mr. Overholser and Dr. Likens — brief statement from each of them. As far as everyone else is concerned, I think we could safely dismiss everyone else at this point.

Mr. Verhei: As far as I'm concerned, the thing's over right now.

Dr. Morton: I don't like testimony of any kind when the person being talked about is not around here.

Mr. Verhei: I don't either.

Mr. Ruen: As far as I'm concerned, of course, go ahead.

Dr. Morton: I'd rather not hear any testimony without Mr. Ferguson being here.

Mr. Verhei: As far as I'm concerned, he's left the meeting and he has substantiated no reason why we should retain him — there's no use going any further. We've gone as far as we can go.

Dr. Morton: There were enough allegations — we've sent our resolution in — I think that's sufficient.

Mr. Verhei: I think so too.

Mr. Featherston: Dr. Likens, in reference to the notices, would you inform the Board as to the time period that was involved on the notice — in his request for a hearing.

Dr. Likens: The notice was served on the 16th of May and was served in person as Mr. Ferguson so stated . . . Mr. Lamanna, I asked Mr. Lamanna to go as my witness — I did not know whether Mr. Overholser or Mr. Miller would be available, in fact, I said to Wib, it's not necessary that Mr. Miller be there — if you're available fine and they were both there, served the notice, and we received notice in return two days before the deadline . . .

Mr. Featherston: We did receive the notice within the deadline period?

Dr. Likens: Within the deadline, yes.

Mr. Featherston: That's all I wanted to verify.

Mr. Ruen: It was a written request.

Dr. Likens: With signed receipt, return receipt requested.

Dr. Morton: It was sent to me because he thought I was still chairman — I signed for it and I answered it as Chairman Pro-Tem because you were out of town . . .

Mr. Ruen: That was what I was asking — it was a certified letter then . . .

Dr. Morton: Right.

Mr. Ruen: Then . . .

Dr. Morton: I think the Board was all sent copies of that letter.

Mr. Ruen: I think so too — we've had so much . . .

Dr. Morton: I asked them to do that . . .

Dr. Likens: The only letter, and I was going to present that tonight, the Board has not received was the copy of the letter that I sent to Mr. Ferguson in response to his request to know who was going to testify against him . . .

Dr. Morton: He had requested in a letter that I had receipted that he be furnished a list — I said he would be furnished a list by a certain date by the Administration.

Mr. Ruen: I have a copy.

Dr. Likens: On June 21st, which was the date that Dr. Morton had spelled out that we would provide it on or before June 21st, we sent the letter. I only have four copies — in which I stated "The Board of Trustees, Bonner County School District No. 82, will select witnesses at the hearing scheduled for 9:00 p.m. on June 26, 1973 in the Administrative offices from the following:" then I identified the "following."

In this particular situation, I did not go to Wib to

contact other parents who had filed complaints — I checked the parents who had expressed concern in writing or had talked to me directly. For the benefit of the Board, Randy Self, and his father, Roy, are here. Mr. and Mrs. Kenneth Mott and Deana, are also present . . .

Mr. Ruen: We understand . . .

Mr. Verhei: I've had some phone calls on this thing too, Vernon.

Dr. Likens: I've had other people come after I sent this letter and say "can we testify" — I said no because I had not so notified them . . .

Mr. Ruen: Are you ready for the question?

Mr. Hagadone read the motion . . . Seconded by Dr. Beeson, the motion carried. All voting "yes."

In the Supreme Court of the United States

October Term, 1977

No. _____

Jacob C. Ferguson, Petitioner

v.

The Board of Trustees of Bonner County School District No. 82, A Municipal Corporation of the State of Idaho, and Vernon Ruen, Dr. William H. Morton, Jr., Venus Verhei, Marian Ebbett, and Dr. David Beeson, constituting the members of said Board, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION to Petition for a Writ of Certiorari to the Supreme Court of Idaho

COUNTER STATEMENT

Respondents cannot agree with parts of Petitioner's Statement. While the facts themselves are not in dispute the conclusions drawn from said facts vary substantially. For this reason, Respondents have set out in its entirety, the Transcript of the hearing before the Board of Trustees of Bonner County School District No. 82. (Appendix A) It is Respondents' position that, based on the entire transcript of the hearing, it can be seen that Petitioner was advised several times of the duty of the Board to present evidence in order to allow Petitioner to cross-examine witnesses. (Appendix A, pp 11-12 and 16) The Respondents further advised the Petitioner of his right to counsel and his right to present evidence in his own behalf. (Appendix A, pp 15-16, 17, 18, 27 and 30) The Board

went even further and suggested that, if the Petitioner desired, a continuance would be granted in order that he could better prepare himself for the hearing. (Appendix A, pp 17, 27 and 30) After being advised concerning his rights, Petitioner willfully declined the opportunities given him to exercise his rights. (Appendix A, pp 17 and 30)

Petitioner's statement that "At least one of respondents agreed that petitioner had correctly interpreted the newspaper's conclusion" is not based on the transcript. The statement which Petitioner refers to is found on page 25 of Appendix A. The respondent referred to was simply agreeing that there was a statement to that effect in the newspaper, not that the Board had dismissed Petitioner. (Appendix A, pp 25-26) In fact, at the beginning of the hearing Petitioner was advised that he was not dismissed from his position as of that point in time. (Appendix A, pp 14, 15 and 26) The notice originally sent to Petitioner speaks in terms of "should" rather than "is" or "has," (Appendix A, pp 15-16) and advises Petitioner of his rights.

Petitioner further attempts to show bias by stating that ". . . one respondent . . . had actually made up his mind . . ." This same respondent indicated on several other occasions, along with other Board Members, that he wanted to be as fair as possible and hear Petitioner's side. (Appendix A, pp 18, 24-25 and 27)

Finally Petitioner's statement that he ". . . was without any record to present to an appellate court; and for him to have stayed at the hearing would have been a futile act since the board had a preconceived conclusion." is not borne out by the record. Whether or not he concluded that any hearing would be fruitless in fending off his dismissal, whether or not he had concluded that no defense could sway the Board he saw as already convinced that he should be dismissed, he knew his right to be